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# Supreme Court of the United States

**OCTOBER TERM, 1950**

**No. 201**

HARRY SACHER, et al.,
*Petitioners,*
v.
UNITED STATES OF AMERICA.

ON PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION OF THE NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

ROBERT J. SILBERSTEIN,
40 Exchange Place, N. Y. C.,
*Counsel for National Lawyers Guild.*

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*To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.*

The National Lawyers Guild respectfully moves this Court, pursuant to Rule 27, paragraph 9, of the Rules of this Court, for leave to file a brief in this case as amicus curiae.[1]

[1] The Solicitor General has previously informed the Guild that since the 1949 revision of Rule 27 of the Court, it has been his uniform policy not to consent to the filing of briefs amicus curiae. For this reason, the Guild did not request the consent of the parties to the filing of a brief amicus curiae.

The interest of the Guild in this case, and its reasons for asking leave to file a brief amicus curiae, are set forth below.

The Guild, as a national bar association, has as a primary objective the promotion and advancement of the administration of justice. In common with other bar associations we have always been profoundly concerned with the defense of the civil rights guaranteed by the Constitution. It is also our function to share with other bar associations the duty of helping to preserve and continue the great tradition of the American Bar. For these reasons, we are profoundly interested in the important issues in this case, which have aroused serious concern among lawyers throughout the country.

The basis of this motion is that there exist facts relevant to the disposition of the instant petition for rehearing which have not been presented to this Court by the parties. These facts concern issues which directly affect the interests and responsibilities of the Bar as a whole, and which far transcend the immediate interests of the petitioners.

The contempt convictions and sentences imposed on the petitioners herein, and the petition for rehearing now before this Court, arise out of the use of the summary contempt power by the trial judge in a case involving leaders of the Communist Party—a case surcharged with sharp emotional reactions. The task of defense counsel in such cases is concededly a difficult one and it is of the utmost importance that there be no confusion respecting either the responsibilities of the members of the bar or of the powers of the trial court. Confusion now exists in both these areas as a result of the three separate opinions and the divided decision rendered by the Court of Appeals below; and this confusion can only be dissipated by a clear pronouncement from this Court.

The importance of the granting of the petition for rehearing by this Court and upon such rehearing, the granting of certiorari in this case, appears from the following facts, which we wish to bring to the attention of the Court—

It has become most difficult for unpopular minority groups to secure counsel for their defense in serious criminal prosecutions now pending. This difficulty, and the "dilemma" thereby created, was recognized in the dissenting opinion of Circuit Judge Clark below. He stated (182 Fed. (2d) 416, 466):

> "It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts. On the other hand, the insistence upon counsel as a part of the constitutional element of a fair trial is more pronounced, more precisely stated, each judicial term. There may be approaching the dilemma that trial cannot be had without counsel, and yet none can be found for the burdensome job."

Judge Clark is not alone in his apprehensions. A group of 17 distinguished Americans, including Prof. Albert Einstein, Dr. Thomas Mann, Prof. Thomas Emerson (President of the National Lawyers Guild), Prof. Robert Lynd and others, in an amicus statement submitted to the Court of Appeals below, expressed their alarm at the threat to the rights of fair trial and effective assistance of counsel, resulting from the contempt convictions in this case. These distinguished Americans stated in part:

> "Today lawyers in various parts of the country who dare to defend clients representing minority views are suffering punishment which strikes at their professional lives and their freedom."

Specific instances which show that these concerns are not groundless are the following:

(a) 17 Communist leaders arrested in the Southern District of New York on June 20, 1951, on Smith Act indictments, advised the Court on July 16, 1951, that they had been unable to secure counsel to represent them. Affidavits were presented to the Court showing that requests made to a large number of prominent members of the Bar to represent the defendants, on a fee basis, had been declined. A

number of the attorneys so solicited frankly advised defendants that although interested in their cases they could not risk disfavor of their clients and the public by appearing in their case. The officers of the Civil Rights Committees of the major bar associations, who were also solicited, were unable to assist the defendants in their quest for counsel.[2] District Judge Sylvester Ryan was evidently compelled to take the unprecedented step of formally calling upon the 4 major bar associations in New York City (the Association of the Bar, the New York County Lawyers Association, the New York Chapter of the National Guild and the Brooklyn Trial Lawyers Association) to submit names of attorneys whom they felt would agree to represent these defendants. Although there are some 20,000 lawyers in the Southern District of New York,[3] most of whom belong to one of these four bar associations, all four associations were only able to submit a total aggregate list of ten names of lawyers who would handle this case.[4] To date only one trial lawyer chosen from this list of ten has been retained to represent one of these 17 defendants, although their trial is scheduled to commence shortly. One additional lawyer from the list, Thomas I. Emerson, was retained to argue preliminary motions for certain of the defendants.

(b) The motion of November 17, 1950, by petitioners in *U. S.* v. *Dennis* in this Court, for a postponement of the arguments of their appeal, presents similar facts. The *Dennis* petitioners advised the Court that they desired to have other counsel (in addition to the petitioners herein) argue their appeal, but were entirely unsuccessful in ob-

[2] These facts are set forth in affidavits filed on July 16, 1951, in *U. S.* v. *Flynn, et al.*, S. D. N. Y., 1951 Cr.

[3] Congressional Record, Feb. 14, 1940, at pp. 2253, 2277, 2280; N. Y. State Bar Ass'n Bull., Feb. 1950, p. 212.

[4] N. Y. Times, August 9, 1951, p. 1, setting forth the names of the 10 attorneys submitted by the four N. Y. C. bar associations.

taining such counsel from the bar in this country and were therefore required to solicit counsel abroad.[5]

The difficulties in obtaining counsel for defendants associated with unpopular causes became sufficiently acute to have led President Truman in a recent message to call it to attention of the 74th Annual Meeting of the American Bar Association.[6]

There now exist numerous pressures upon the members of the bar which produce this trend, which directly conflicts with the finest traditions of the Bar.[7]

Our courts share with the Bar, the responsibility for reversing this trend—for responding to this plea recently made in a noted legal essay: "let us defend to the utmost that great doctrine that every man, every cause, every faith, shall receive adequate and just advocacy at our hands. If we surrender this we lose one of the greatest principles on which we built this nation. * * *"[8]

To the extent that the undefined limits and possible misuse of the summary contempt power by trial courts has contributed to this fear of lawyers to represent members of unpopular minorities, it becomes important that the limits of this power be expressly fixed and not left in a state of unclarity. The proper scope and exercise of the summary contempt power, and the need for its delineation, is directly at issue, in the petition for rehearing now before this Court.

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[5] *U. S.* v. *Dennis*, 340 U. S. 887.

[6] Letter of Pres. Truman dated September 1, 1951, to Criminal Law Section of American Bar Association, quoted in full in the New York Times, Sept. 19, 1951, at p. 10.

[7] Professor Cushman has observed that that tradition of the American Bar in defending civil liberties, and the rights of unpopular minorities "stretches all the way from James Otis defending two Boston merchants against tyrannical Writs of Assistance in 1761 to Wendell Willkie defending the Communist, William Schneiderman in 1943" (R. E. Cushman, Civil Liberty and Public Opinion in Safeguarding Civil Liberties Today, 1945, at p. 105).

[8] E. Wilkerson, *The Proper Place of the Lawyer in Society*, 36 American Bar Ass'n Journal, pp. 289, 347 (1950), at p. 348.

We do not assert that the fear of punishment for contempt is the only factor responsible for the trend we have described. The effect of the existing hysteria on their practice and standing, has been cited by some prominent attorneys, as their reason for declining to represent unpopular defendants.[9]

The threat of physical violence may have played a role. Mr. John Poole, a member of the Mississippi bar, who represented the Negro Willie McGee in the Mississippi state court, when he was tried on a charge of rape, was physically attacked by a group of men as he was boarding a plane for Washington, D. C., in an apparent effort to prevent him from presenting an application for a stay of execution to this Court.[10] Mr. Poole subsequently resigned from the case, and threatened state disbarment proceedings against him were dropped.

Most recently the qualifications of Senator Henning of Missouri to sit on a Senate sub-committee were challenged on the ground that his law firm represents the St. Louis Post-Dispatch, and his law partner Mr. John Raeburn Green, a confirmed anti-communist, filed a petition for rehearing (without fee) for one of the petitioners in the *Dennis* case.[11]

But one cannot say that the fear of the action of the courts has not been a significant contributing factor. On

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[9] In *U. S. v. Dennis*, 340 U. S. 887, the defendants in their motion of November 17, 1950, advised this Court that 24 "leaders of the American Bar", separately solicited, all declined to participate in the argument of their appeal to this Court—some on the express ground that such participation would injure their professional standing and practice. Similar statements are made in a letter from Miss E. G. Flynn, dated September 18, 1951, to Mr. Cody Fowler, President of the American Bar Assn, respecting the efforts of the defendants in *U. S. v. Flynn*, Crim.: S. D. N. Y., 1951, to obtain counsel to represent them. (N. Y. Daily Compass, Sept. 19, 1951, p. 5).

[10] New York Times, July 23, 1950, p. 60; July 27, 1950, p. 48; N. Y. Daily Compass, July 23-28, 1950.

[11] New York Times, September 22, 1951, p. 6; September 19, 1951, p. 2.

December 16, 1949, Mr. O. John Rogge, former U. S. Assistant Attorney General, and Messrs. William Patterson and Emanuel Bloch, attorneys for six Trenton Negro youths charged with murder, were barred from further representing their clients because of the Court's disapproval of statements attributed to them regarding the conduct of the previous trial, made out of court. These attorneys had succeeded in securing a reversal of a prior murder conviction against all six defendants.[12]

A number of distinguished California trial lawyers, including the former Attorney General of California, representing the C. I. O. Fisherman's Union in an anti-trust action, were harshly and publicly censured by the United States Circuit Court on September 28, 1949 for having challenged on constitutional grounds, the methods of jury panel selection.[13] These attorneys were so publicly rebuked although the appellate court in part conceded the validity of their challenge.[13]

On October 22, 1949, just 8 days after the petitioners at bar were held in contempt by the District Judge, Mr. Vincent Hallinan, a prominent West Coast attorney, was held in contempt and sentenced to 6 months imprisonment during the first week of his defense of Harry Bridges, trade-union leader.[14]

The use or threatened use of the contempt power has not been confined to prosecutions against Communists, Negroes, trade-unionists or radicals alone; but in the recent period has generally become more widespread.[15]

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[12] New York Times, December 17, 1949, p. 1; December 18, 1949, p. 6.

[13] *Cf Local 36 of International Fisherman, C.I.O.* v. *U. S.*, 177 F. (2d) 320, at pp. 340, 341.

[14] This contempt conviction, involving somewhat different issues than the case of the petitioners at bar, was affirmed by the Ninth Circuit Court of Appeals in *U. S.* v. *Hallinan*, 182 F. (2d) 880, cert. den. 71 S. Ct. Rep. 1010.

[15] Thus in the recent abortive prosecution of 18 N. Y. C. policemen on charges of conspiracy to accept bribes, in the County Court

The great dangers inherent in the use of the summary contempt power have always been recognized.[16] The increasing use of this exceptional power, and its recent application against defense lawyers has caused widespread concern among the bar throughout the country.[17]

This Court emphasized its continuous concern with dangers inherent in the summary contempt power, particularly where exercised against an attorney, when it recently granted certiorari in the case of *Fisher* v. *Pace*.[18]

In the *Fisher* case the contempt citation arose out of the trial of a workmen's compensation case in a Texas state court, and the imposition by the trial court of a $100 fine and 3 days imprisonment for contempt.

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of Brooklyn, New York, the trial judge issued the following threat of contempt citation against one of the defense attorneys, for pressing a challenge to a juror, on the second day of the voir dire examination: "If you continue as the Communist lawyers did, I'll take action now instead of waiting till the end of the trial." (N. Y. World Telegram & Sun, Sept. 11, 1951, at pp. 1, 2).

[16] Nelles, *Summary Power to Punish for Contempt*, 31 Col. Law Rev. 956; *Anderson* v. *Dunn*, 6 Wheat. 204, 227 (1821); *in re Michael*, 326 U. S. 224, 227 (1945); *In re Oliver*, 333 U. S. 257 (1948).

[17] Harper and Haber, *Lawyer Troubles in Political Trials*, 60 Yale L. J. 1 (Jan., 1951); 99 U. of P. Law Rev. 540. A recent comment in 2 Stanford Law Rev. 769 (July, 1950) emphasizes the great danger in the use of the summary contempt power "particularly * * * in these times, when members of political minorities appear more and more often in the defendant's docket in widely publicized and heated trials * * *." For an expression of the concern of the English bar, see Whitty, *The Hallinan Case*, 14 Modern Law Review 89 (London, Jan., 1951), also noting that contempt sentences against attorneys are virtually non-existent in English courts at present.

[18] 334 U. S. 827.

The contempt adjudication in *Fisher* v. *Pace* was only sustained by a bare majority of this Court,[19] and three separate dissenting opinions were filed.[20]

When the question of the exercise of summary contempt power becomes intertwined with the other factors present in the instant case—and when the fear of contempt citation becomes a contributing factor in a trend towards the deprivation of the constitutional right of counsel to unpopular minorities—then the question of the limits of the proper scope and exercise of the contempt power of the trial court becomes an issue of transcendent importance to the bar.

That this is the situation, we have attempted to show by the facts referred to above.

In fulfillment of its duty as a bar Association, concerned with the promotion and advancement of the administration of justice, and with the protection of the civil rights guaranteed by the Constitution, the National Lawyers Guild respectfully seeks leave to file a brief, amicus curiae, in this case.

Respectfully submitted,

ROBERT J. SILBERSTEIN,
40 Exchange Place, N. Y. C.,
Counsel for National Lawyers Guild.

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[19] 336 U. S. 155, affirming by a 5-4 decision the divided opinion of the Texas State Court (206 S. W. (2d) 1000) upholding the citation.

[20] 336 U. S. 155 at 163 (Dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black); id. at 166, separate dissent by Mr. Justice Murphy; id. at 168, separate dissent by Mr. Justice Rutledge.